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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ALEXIS F., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. JENNIFER F. et al, Defendants and Appellants; VIRGINIA W., Petitioner and Appellant.	G028701 (Super. Ct. No. DP003392) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Duane T. Neary, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant Jennifer F.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant Raymond W.

Stephanie M. Davis, under appointment by the Court of Appeal, for Petitioner and Appellant Virginia W.

Laurence M. Watson, County Counsel, and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

Paoli & Paoli and Sylvia L. Paoli, under appointment by the Court of Appeal, for the Minor.

* * *

Jennifer F. (the mother) appeals from the denial of her petition under Welfare and Institutions Code section 388 (all statutory references are to the Welfare and Institutions Code) and Raymond W. (the father) joins in her appeal. Both parents had previously been denied reunification services with their infant daughter Alexis. The mother argues her circumstances had sufficiently changed and modifying the court's prior order and granting reunification services would be in the child's best interests. The Orange County Social Services Agency (SSA) argues any changes in the mother's circumstances were minor and do not show the child would benefit. We agree and therefore affirm.

Virginia W. (the aunt), was denied custody after Alexis was removed from her parents' home. She filed a section 388 petition, which was denied without a hearing, and now appeals. The aunt argues denial of the petition without a hearing constituted an abuse of discretion because the declaration attached to her petition sufficiently demonstrated a change in circumstances. SSA argues the declaration was conclusory and did not address the core reasons she was denied custody at the outset. We agree and therefore affirm.

I

FACTS

Alexis, then four months old, was living with the mother, the father and her half sister, Kaitlyn F., in July 2000. (Kaitlyn is the mother's child by Jason R.; the mother is not married to the father of either child. Kaitlyn is not involved in this appeal.) Kaitlyn and Alexis were initially removed from the home on July 31, 2000. On that date the mother walked into the Anaheim Police Department and reported the father had severely beaten Kaitlyn with a belt on several occasions over the previous few days. Kaitlin had severe bruises on her arms, legs, buttocks and stomach. The mother was present during the beatings, and claims she tried to stop the father, but she did not call the police or seek other help until she left the home with the children several days later. She claims she feared for her life, although there was evidence she had several prior opportunities to leave or call for help.

The children were taken into protective custody. Kaitlyn's statements indicated continuing domestic violence, substance abuse, and prior physical abuse. SSA's investigation also revealed the mother knew the father had been involved in previous domestic violence and that domestic violence had been an ongoing problem in their home.

The social worker was deeply concerned by the mother's behavior after the children were removed from the home. Although the social worker provided referrals for counseling and drug testing in August, the mother did not sign up for domestic violence classes until one week before the jurisdiction/disposition hearing in October. She also failed to return the social worker's calls to report on her progress.

Moreover, at the time of the hearing, she had not begun to address any of the issues surrounding her relationship with the father. Despite the horrible beating he had inflicted on Kaitlyn, the mother left an apparently apologetic note for the father regarding her decision to leave with the children on the day she went to the police station. Thereafter,

she was uncooperative with the district attorney's office, which prosecuted the father for beating Kaitlyn. She also visited the father in jail on as many as 16 different occasions beginning the day after the children were removed, although she testified in court she visited him four times. In the social worker's opinion, the mother's behavior contradicted her statements that she was afraid of the father.

At the jurisdiction/disposition hearing, no reunification services were recommended for either the mother or the father because of the severe abuse Kaitlyn had suffered. At the time of the hearing, Kaitlyn had already been placed with her father, Jason R. Alexis was in foster care.

Relative placement was considered for Alexis with the father's relatives, but the social worker had reservations about them as appropriate placement resources because of their strong commitment to the father. The SSA report indicates the aunt was under evaluation and that Alexis might be placed with her in the near future. An addendum report seemed to indicate transitioning Alexis into the aunt's care was highly likely.

At the hearing, however, the court ruled that a hearing would be required before Alexis could be placed with any paternal relatives. Thereafter, the social worker had a telephone conversation with the aunt that raised concerns about the aunt's ability to protect the child. When asked if she was aware of the reasons why the father was in jail, the aunt replied "due to violating his probation conditions." She also made other comments regarding his previous positive relationships with Kaitlyn and her own daughter that indicated the aunt had not accepted the extent of the father's brutal treatment toward Kaitlyn. To the social worker, this indicated she might be unwilling or unable to protect Alexis from him, and she recommended against placement with the aunt. Alexis was placed with a concurrent planning family in January 2001. The section 366.26 hearing was held in February 2001, and on the same day, the mother's and the aunt's section 388 motions were heard and denied.

II

DISCUSSION

Section 388 Petitions

Both the mother and the aunt appeal the court's decision denying their respective section 388 petitions. The father joined both appeals. Section 388 permits "[a]ny parent or other person having an interest in a [dependent] child . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of the court previously made . . . ." The moving party bears the burden of proving both a change in circumstances and that a change in the prior order would be in the child's best interests. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.)

We review section 388 petitions for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Therefore, we will not disturb the trial court's decision unless the court "has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination . . . . 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Ibid.*)

The Mother's Appeal

Section 388 has been characterized as an "escape mechanism" that is properly activated when parents undergo a complete reformation in the short period between the end of reunification services and the termination of parental rights. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.)

The mother points to her cooperation with the district attorney's office after the October hearing as evidence of changed circumstances. She testified against the father at his trial, and wrote a letter to the judge asking for the maximum possible sentence. She

also points to her continued visits with Alexis and "initiat[ing]" entry into counseling programs without the help of a reunification services order[1] as evidence of changed circumstances. These steps, however, cannot be characterized as the "complete reformation" contemplated by *Kimberly F.*

SSA provided the mother with counseling and domestic violence referrals in August. By February, she had attended three sessions of a 10-week domestic violence program and three sessions of the "Choices" program. She did not participate in any individual counseling beyond the initial intake session. She claimed her participation in these programs was limited by her funds and transportation difficulties, but she was living with her mother without paying rent, and her father had offered to help her with at least some of the cost of counseling. She also made few efforts to find employment, as she testified she had applied for work from only five companies. Although drug use was a concern for SSA, there is no evidence the mother ever participated in drug testing or counseling.

The court's evaluation was that the mother was very immature and had neither accepted responsibility for what had happened to Kaitlyn, nor gained any insight that might prevent her from entering into another abusive relationship. The court appeared to be quite disturbed by the mother's "marked nonchalance" about her attempts to initiate counseling or find employment. The court noted, "She talks about it as if she were talking about a late homework assignment. [¶] The court does not find that her demeanor is consistent with any

[1] Throughout her brief, the mother points out that she was not offered reunification services, but that is not our focus at this stage of the proceedings. The sole issue before us is whether the section 388 petition was properly denied. If the mother believed she was entitled to reunification services, her remedy was a writ petition after the referral to the section 366.26 hearing.

claim of new insight, new revelations, or certainly any kind of evidence that would indicate to the court that it needs to undo its former order to serve the best interests of the minor."

We agree. The standard for a change of circumstances as contemplated by *Kimberly F.* is the removal of the reason for the dependency. (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 522.) In *Kimberly F.,* that reason was an unsanitary home, acknowledged by the court as "not as serious" as many of the other typical reasons for dependency, including child abuse. (*Id.* at p. 521-522.) Here, we are faced with an extremely serious reason for dependency: a failure to protect that led to the severe beating of Alexis' half sister. We are unable to see any evidence that the reasons underlying the mother's failure to protect Kaitlyn had been addressed.

Because the mother has not met the first prong of section 388, we are not required to address the second prong, the best interests of the child. However, we note the mother has failed to present evidence that a change in the court's order would be in Alexis' best interests. Other than general assertions that being raised by one's biological family is best for the child, there is no evidence before us of a strong parent-child bond as was the case in *Kimberly F.* (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 532.) If we were to accept the general assertion that being raised by one's biological family is inherently better than being raised by an adoptive family, the second prong of section 388 would be meaningless, because being raised by the natural family would *always* be in the child's best interests. We decline to adopt such a reading of the statute. Moreover, the law is clear that at this stage in the proceedings, the child's right to permanency and stability is paramount. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

Because the evidence does not support the mother's assertion that any genuine change of circumstances occurred, the court did not abuse its discretion in denying the mother's section 388 hearing.

The Aunt's Appeal

The aunt argues the court abused its discretion by denying her section 388 petition without a hearing. A hearing is not automatic, but shall only be granted if "the best interests of the child may be promoted by the proposed change of order . . . ." (§ 388, subd. (c).) While section 388 petitions are to be construed liberally in favor of their sufficiency (Cal. Rules of Court, rule 1432 (a)), the petition may be denied without a hearing if the proponent's petition fails to state a change of circumstances or new evidence that might require a change of order. (*Ibid.*)

We first note that a great deal of the aunt's argument appears to rest on the notion that the court failed to apply section 361.3, which grants relatives "preferential consideration" for placement, and section 366.26, subdivision (k), which grants relative caretakers preference for adoption. (§§ 361.3, subd. (a), 366.26 (k).) Section 361.3, subdivision (a) does not apply here because it is inapplicable at the permanency planning stage. (*In re Baby Girl D.* (1989) 208 Cal.App.3d 1489.) Because she was never a relative caretaker, section 366.26 subdivision (k) is similarly inapplicable. Therefore, we must simply examine the two prongs of section 388: a genuine change in circumstances and that the child's best interests would be served by a change in the court's orders.

The aunt was found unsuitable by SSA because she did not acknowledge the father's brutal beating of the child's half sister, thereby demonstrating that she might be unwilling or unable to protect the child. It was the aunt's mental state respecting the father's actions that was of concern to SSA. The aunt's declaration in support of her section 388 petition states the father "was sentenced to four years State Prison [sic] . . . . During this time I will not allow Raymond Wheeler contact with Alexis. Once he is released Raymond will not be allowed to live with me or visit my home. His contact with our family will be limited. I will protect Alexis from Raymond and I can provide a safe home for her."

This is the only reference in the declaration to the issue that resulted in SSA's decision that the aunt was not an appropriate caretaker, and it is more important for what it does *not* say than for what it does. It does not acknowledge that the father inflicted a brutal beating on Alexis' half sister; it does not acknowledge that he is a convicted felon with a history of domestic violence; it does not state the aunt will prevent the father from having any contact with Alexis, but only that he will not have any contact with Alexis while he is imprisoned. Thereafter, he will have "limited" contact. This declaration does not address SSA's concern that the aunt is not fully appreciative of the gravity of the father's acts or the future danger he poses to Alexis. In short, on the face of the petition, the aunt did not sufficiently address the facts that led to SSA's determination that she was an unsuitable caretaker. Therefore, the court did not abuse its discretion in denying the aunt's request for a hearing.

As we noted with respect to the mother, the aunt also fails to meet the "best interests" prong of section 388. Her statement that she had a "previous relationship with Alexis prior to dependency" borders on ridiculous: prior to dependency, the child was no more than four months old. The aunt's assertion of a true "bond" with a child of that age is not something the court was required to accept on its face. She states she had no visitation with Alexis after the child was taken into protective custody, and we have no evidence before us that she has had any contact with the child between July 2000 and the section 388 hearing in February 2001. Thus, the aunt's bare conclusion of a "bond" was insufficient to meet the best interests prong of section 388.

III

DISPOSITION

The juvenile court's orders are affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.